

enquiry to be transferred to another magistrate. In dismissing the application, the learned Judge then held that the duty of a magistrate being to find whether there was a case for committal to the High Court, it could not be said that the liberty of the accused was in jeopardy.

The answer to this question lies with the meaning of the words "... judgment, sentence or order", especially the word "order" against which a party may prefer an appeal. Thorne, J. had very clearly and correctly given the word a restricted meaning but his Lordship did so on the ground of certain inconclusiveness of the order of committal for trial as explained by him, but in my view, with respect, the real rationale for such a restricted meaning was pin-pointed by Hashim Yeop A. Sani, F.J. in the very recent case of *Cheak Yoke Thong v. Public Prosecutor*⁶, in which the same word in the same section came up for judicial interpretation. His Lordship applied the maxim of *ejusdem generis* and construed the word "order" with the immediately preceding words of "judgment" and "sentence" and held that the word "order" should therefore mean an order that should finally dispose of the rights of the parties. His Lordship further held that the order of the lower court refusing to disqualify itself on the ground of likelihood of bias was not appealable. Here in the instant appeal, the learned Magistrate could have no power to acquit or convict the appellants, his order of committal for trial, not being such a final order, is therefore not appealable. Having so decided, it is not necessary to go into the evidence to ascertain whether there were sufficient grounds for committing the applicants for trial in connection with the allegedly tragic death of a young unmarried girl said to have been raped, dumped near a rubbish dump and then burnt in what appears to be a most heinous crime.

The appeal is dismissed and the order of committal for trial in question is therefore confirmed.

Appeal dismissed H

Solicitors: *Jegadevan Nadchatiram.*

A SARASWATEE D/O ARUMUGAN & ANOR. v. TAN CHONG & MOTORS CO. SDN. BHD.

[A.C.J. (Wan Hamzah J.) December 31, 1984]
[Kuala Lumpur — Civil Appeal No. 36 of 1982]

B *Practice & Procedure — Pleadings — Both counsel conceded pleadings not properly drawn — Whether on appeal both counsel could submit agreed list of issues to replace pleadings.*

Evidence — Submission of agreed list of issues to replace pleading on appeal — Whether proper evidence.

C In this case the appellant claimed damages for alleged breach by the defendants of a hire-purchase agreement. The issues in the case had not been set out clearly and completely by both parties in their pleadings but the learned Magistrate proceeded to try the case and gave judgment for the plaintiff. The defendants appealed. On appeal both counsel for the plaintiffs and defendants informed the court that they were in agreement that the pleadings had not been properly drawn and submitted an agreed list of issues, none of which had been raised in the pleadings to replace the pleadings.

E Held: it was not possible to make a fair and just determination of these issues and to give a correct judgment in the case without proper evidence before the court because at the trial these issues had not been placed before the Magistrate. In the premise therefore it could not be said that the minds of the parties and the Magistrate were directed to these issues at the time when evidence was tendered and admitted. In order that justice be done, the real issues should first be set out clearly and a fresh trial of the case ordered before another Magistrate.

F CIVIL SUIT.

S. Sothi for the appellants/defendants.

Evelyn Wan for the respondent/plaintiff.

Cur. Adv. Vult.

G **I** **Wan Hamzah J.:** In the Kuala Lumpur Magistrate's Court Civil Action No. 10046/1979 the Plaintiff claimed damages for alleged breach by the Defendants of a hire-purchase agreement. No particulars of the hire-purchase agreement or of the alleged breach were stated in the Statement of Claim and the record does not show that the Defendants asked for particulars. But they proceeded to file Statement of Defence and Counterclaim, in which they made certain allegations from which it appears that they tried to plead that there was no contract whereby they were bound to buy a car from the Plaintiff. But in spite of that they contended that the Plaintiff wrongly repudiated "the whole terms of the agreement" as if there had been a contract between the parties, and the Defendants stated this contention without stating that it was pleaded as an alternative to the other contention.

They counterclaimed for a certain sum of money for refund of deposit which they alleged they had placed with the Plaintiff. The Plaintiff filed Reply and Defence to Counterclaim to deny allegations made by the Defendants and to contest the counterclaim. The Magistrate proceeded to try the case although the issues had not been set clearly and completely. The Magistrate gave judgment for the Plaintiff but did not make any order on the Defendant's counterclaim.

When this appeal came up for hearing in this Court Counsel for the Plaintiff and Counsel for Defendants informed the Court that they agreed that the pleadings had not been properly drawn and they submitted an agreed list of issues to replace the pleadings. The list contains seven issues and also certain statements agreed upon by both Counsel. The list with the statements is attached to this judgment. None of these issues had been raised in the pleadings. They asked this Court to determine these issues.

In my opinion it is not possible to make a fair and just determination of these issues and finally to give a correct judgment in the case without proper evidence before the Court. At the time of the trial these issues had not been placed before the Magistrate and it cannot be said that the minds of the parties and of the Magistrate were directed to these issues at the time when evidence was tendered and admitted. There can be proper evidence only if the issues were clear in their minds and evidence was adduced and admitted accordingly. I believe that in view of the many irregularities in this case and in order that justice be done, there should be fresh trial of the case before another Magistrate, but before fresh trial is held the real issues must first be set out clearly. Therefore I order that the judgment of the Magistrate given on October 23, 1981 be set aside and that the Plaintiff should amend its statement of Claim. After the Plaintiff has filed and served its amended Statement of Claim the Defendants should amend their Statement of Defence and Counterclaim. Whether or not the Plaintiff should amend his Reply and Defence to Counterclaim or should withdraw it, will of course depend on how the Statement of Defence and Counterclaim will be amended. Then the case should be fixed for fresh trial. I further order that the respective solicitors themselves should bear the costs of the previous trial and of this appeal and the cost of the amendments, considering that the confusion had been caused by them.

AGREED LIST OF ISSUES

1. As to whether a minimum deposit in cash or goods of 10% of the cash price was made as required by section 31(1) of the Hire Purchase Act and in this connection whether the two post-dated cheques (exhibits P6 and P7) can be regarded as cash.

2. If the Court finds that the minimum deposit was not made as required whether such failure renders the Hire Purchase Agreement null and void and unenforceable.

3. Whether an adverse inference can be drawn against the Plaintiff for failure to call as witnesses the two boys referred to in the evidence of PW 1.

4. Whether the onus is on the Plaintiff to prove surrender or early determination or on the Defendant to prove seizure or repossession and whether the motor vehicle in question was repossessed or seized by the Plaintiff or whether it was surrendered by the First Defendant by way of early determination of the Hire Purchase Agreement.

5. Whether the Plaintiff's proper remedy was to sue on the dishonoured cheque or cheques.

6. On whom the onus lies of proving that the vehicle in question was resold by the Plaintiff at a fair price.

7. What is the proper calculation under section 18(2) and (3) of the Hire Purchase Act.

Sections referred to above are as in the Hire Purchase Act, 1967 as it now is. The sections at the time of the hearing in the Magistrate's Court would have been one number less in each case.

The above issues are submitted on the express agreement between both counsel that the pleadings in this case do not properly set down the issues and that the issues above stated will in effect replace the pleadings. It is therefore agreed by both counsel that failure to make any allegation or the existence of any statement in either of the pleadings shall not be taken for or against either party.

The Appellants/Defendants withdrew their counterclaim and the appeal from the learned Magistrate's decision thereon and it is agreed by both counsel that there be no costs on such counter-claim whether in the Magistrate's Court or in this Court.

Dated this 12th day of May, 1984.

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Counsel for the
Defendants/Appellants

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Counsel for the
Plaintiff/Respondent

Order accordingly.

Solicitors: *Syarikat S. Sothi; Choo, Chew Wan & Co.*